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In The

Supreme Court of the United States

October Term, 1969

No. 1193

HAROLD L. BURKE, PIONEER CASUALTY COMPANY, a Texas corporation, and PIONEER GENERAL AGENCY, INC., a Texas corporation,

Petitioners,

vs.

THOMAS C. HUNT, Conservator and Trustee of North Central Fire & Casualty Co., SAMUEL H. WEESE, Receiver of North Central Fire & Casualty Co., FIDELITY AND DEPOSIT COMPANY OF MARYLAND, a Maryland corporation, and MURPHY FINANCE COMPANY, a Minnesota corporation,

Respondents.

REPLY TO PETITION FOR WRIT OF CERTIORARI

DOUGLAS M. HEAD
Attorney General of the
State of Minnesota
ARNE L. SCHOELLER
Chief Deputy Attorney General
of the State of Minnesota
and
CLAY B. MOORE
Special Assistant Attorney General
of the State of Minnesota
1000 First National Bank Bldg.
Minneapolis, Minnesota 55402
Attorneys for Respondents
Hunt and Weese

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1. OPINION BELOW

The opinion of the Supreme Court of Minnesota which is sought to be reviewed here is reported in — Minn. —, 172 N.W.2d 292, sub. nom. *Thos. C. Hunt, Conservator and Trustee of North Central Fire & Casualty Co., et al., v. Nevada State Bank, et al.*

The petition erroneously names Frank Montgomery as one of the plaintiffs-respondents. Montgomery was originally one of the plaintiffs but Samuel Weese, the present insurance commissioner of West Virginia, has been substituted for Montgomery. (See Order of Judge Arthur Stewart, Ramsey County District Court, October, 1969.)

2. STATEMENT OF THE CASE

The petitioner's Statement of the Case (Pet. pp. 6-8) is, in its general outline, correct, but some additional comments and corrections are necessary.

The petition states that the complaint in this action "in substance alleged that all of the defendants participated in a conspiracy to strip North Central of $750,000.00 of its assets * * *." This statement is only partly accurate; the complaint is not limited to a conspiracy charge. The complaint states several other claims for relief in addition to conspiracy. The defendants, in the main action, are each charged jointly and severally with causing or contributing to:

(1) The fraudulent transfer, in at least two instances, of $750,000.00 of North Central's assets.

(2) The unlawful premature payment of $750,000.00 of Certificates of Deposit owned by North Central contrary to Federal Reserve regulations and the terms of the Certificates.

(3) Breaches of various of the defendants' fiduciary responsibilities to North Central and its policyholders.

(4) The fraudulent conversion and misappropriation of $750,000.00 of North Central's assets.

(See Minnesota Court opinion, 172 N.W.2d at 298, and Complaint.)

The claims against Fidelity & Deposit Co. of Maryland in the $100,000.00 action on North Central's employees' fidelity bond rest, for the most part, on the same causes of action asserted in the main action.

Petitioners Burke, Pioneer General Agency, Inc., and Pioneer Casualty Co. are included with all other defendants in the claims for relief in the complaint. It is significant to note

that the Minnesota Court stated in a footnote to its decision (172 N.W.2d at 300, footnote 13):

> "Rule 103.03(i), Rules of Civil Appellate Procedure. Even considered on the merits under our powers of discretionary review, however, and taking the plaintiff's allegations as true, *a viable cause of action is clearly stated.*" (Emphasis added.)

In addition to the main allegations of the complaint the respondents-plaintiffs served upon petitioners' counsel on May 31, 1968, Amendment "Y" to the complaint which is reprinted in full with the affidavit of service in the appendix hereto (A. 1). This Amendment contains several allegations specifically related to petitioners Burke and the Pioneers.

Petitioners are apparently under the impression that Amendment "Y" was not effective. In this they are mistaken. At the time Amendment "Y" was served—May 28, 1968—the complaint had been served but these petitioners had not yet served or filed an answer to the complaint. Under *Minnesota Rules of Civil Procedure*, Rule 15.01, it is provided in pertinent part:

> "15.01 Amendments. A party may amend his pleading once as a matter of course and any time before a responsive pleading is served * * *."

This rule of Minnesota is identical in all respects to Rule 15(a), *Federal Rules of Civil Procedure*. On May 28, 1968, the petitioners had done nothing more than serve a motion to dismiss. Petitioners' answer was not served actually until December 26, 1969, about seven months later, following the Minnesota Supreme Court's decision on the jurisdictional questions. (See Record.) Amendment "Y" is therefore an effective amendment as to these petitioners.

3. PROCEEDINGS IN THE TRIAL COURT

The petitioners' motions to dismiss were supported by three affidavits of petitioner Burke, individually, and as president of Pioneer General Agency and Pioneer Casualty Co. (see petitioners' brief below, A. 1-5, A. 8-10, A. 12-14). These affidavits were, in the main, broad conclusionary affidavits couched in statutory language designed merely to create an issue rather than to reveal. Respondents-plaintiffs countered with voluminous affidavits which are contained in the original record before the Court. (See affidavits of Hunt, I, II, III, IV and V with attached exhibits.) As is customary, no oral testimony was taken, the matter being submitted wholly on affidavits and the pleadings.

Hearings before the trial court were held on May 28, 1968. The trial judge rendered his orders granting petitioners' motions on September 4, 1968 in both the main action and the bonding company case (see Petition, Appendix 46-54). These orders were reversed by the Supreme Court of Minnesota in the decision of which review is sought by petitioners.

The proceedings in the trial court were procedurally in accord with standard practice under the Minnesota rules. The petitioners did not request the opportunity to present oral testimony or documentary evidence other than by affidavits, although that option was available to them.

4. PROCEEDINGS FOLLOWING THE MINNESOTA SUPREME COURT'S JUDGMENTS OF NOVEMBER 19-20, 1969

Following the Minnesota Court's decision, the respondents-plaintiffs began the process of pre-trial discovery. Several depositions of Minnesota residents were taken in January, 1970. In addition, notices of depositions for several witnesses in Las Vegas, Nevada were served. These depositions began February 10, 1970 (see Petition, Appendix 65-66). Petitioners sought protective orders on various grounds be-

fore the trial court which were denied by the trial court's order of January 29, 1970 (see Petition, A. 67-69). Petitioners then sought a writ of mandamus from the Minnesota Supreme Court on February 3, 1970 seeking to halt the scheduled Las Vegas depositions. This effort was denied by the Minnesota Supreme Court by order dated February 6, 1970 (see attachment to petition). On February 6, 1970 petitioners applied to the Minnesota Court for a stay of all proceedings in this action until its application for a writ of certiorari was decided by this Court. This applicaton was similarly denied by the Minnesota District Court (see Petition, A. 78).

We do not know why the petitioners have included these references to the recent discovery proceedings in the Minnesota Courts. The petition itself clearly limits the matters for review on page 1 wherein it is stated:

> "This is a petition by Harold L. Burke, Pioneer Casualty Company and Pioneer General Agency, Inc., for a writ of certiorari to review judgments of the Supreme Court of the State of Minnesota entered in the above actions *on November 19 and 20, 1969.*" (Emphasis added.)

No review is sought of the Minnesota Court's denial of a writ of mandamus on February 6, 1970 or the denial of a stay on the same date.

Furthermore, the Las Vegas depositions have been completed, having consumed eight days from February 11th to February 20, 1970. Any issue regarding those depositions is moot.

REPLY TO PETITIONERS' ARGUMENTS

The petitioners have presented four questions. None of these questions present a federal question of substance. Nor have the petitioners demonstrated that the Minnesota Supreme Court decided any federal question not in accord with applicable decisions of this Court, within the meaning of Rule 19, *Rev. Rules, Supreme Court of the United States.*

Question No. 1
(Petition pp. 3 and 18-20)

In Question No. 1 the petitioners assert that the Minnesota Court accepted the allegations of plaintiffs' complaint as "conclusive against jurisdictional motions supported by affidavits," and that due process was thereby denied.

The petitioners are in error as to what the Minnesota Court did. The Minnesota Court did indeed state that, for the purpose of a motion under Minnesota Rule 12.02, the allegations of the complaint must be taken as true. Opinion below, 172 N.W.2d at 296. However, the Minnesota Court also clearly stated at 172 N.W.2d at 297:

> "We therefore rely on the plaintiffs' complaint *and the evidence adduced at the hearings* upon the various motions for a statement of the facts." (Emphasis added.)

At 172 N.W.2d 308-309, the Minnesota Court observed specifically with respect to these petitioners:

> "With respect to the ground upon which the trial court dismissed the actions against the Pioneer companies, we reach a different conclusion. The available facts are based *upon documentary evidence rather than any resolution of testimonial conflict, as to which we would be required to defer to the trial court.* We think the allegations of the complaint *and the collateral evidence*, taken as true, sufficiently establish a factual issue as to the role of the Pioneer companies, as corporate entities, in the alleged conspiracy." (Emphasis added.)

The Minnesota Court further stated at 172 N.W.2d 309:

> "*Other documentary evidence* would raise an inference that the role of the Pioneer companies was not merely passive, but active, involvement in a crucial early stage of the alleged scheme." (Emphasis added.)

And similarly as to petitioner Burke:

> "As an aid to understanding what Burke allegedly stood to gain by these complicated financial dealings, it is appropriate to recite some of the details of *the purchase agreement* between Sheehan and Burke as sellers and Financial Funding as buyers dated March 24, 1966 and signed by Yearbury for Financial Funding." (Emphasis added.)

It is therefore obvious that the Minnesota Court relied upon the various affidavits and attached documents in making its findings as to the jurisdictional contacts of these petitioners. These affidavits and attached documents are contained in voluminous affidavits filed by respondent-plaintiff Hunt in opposition to the various motions to dismiss for lack of jurisdiction (Hunt affidavits I, II, III, IV and V).

The petitioners have no valid complaint about the procedure adopted, which is common in both the Minnesota and Federal Courts. Both parties consented to the hearing of petitioners' motion to dismiss on affidavits and the petitioners cannot now complain. *Bowman v. Curt G. Joa, Inc.* (C.A. 4th, 1966), 361 F.2d 706, 716-717.

The petitioners do not deny that the various affidavits of the plaintiffs support the Minnesota Supreme Court's findings. The argument rather seems to be that the petitioners' affidavits were ignored, which hardly raises a federal question.

We point out, in addition, that the respondents-plaintiffs, unlike ordinary litigants, played no part in the complex financial transactions involved in these cases. The plaintiffs are public officials of the State of Minnesota and West Vir-

ginia with statutory duties as receiver and conservator of the assets of North Central. Plaintiffs' knowledge of the facts is obviously not first-hand knowledge; only the petitioners have that kind of knowledge.

The very nature of the transactions involved, which are alleged to constitute a fraud and a conspiracy to defraud, make it imperative that the plaintiffs not be put to impossible burdens of proof at the initial stage of these proceedings before the plaintiffs have had an opportunity for the searching inquiries available under the discovery rules. The facts and information available to the plaintiffs and presented to the Minnesota Court were more than sufficient to establish that the petitioners were engaged in relevant activity which was directly concerned with the State of Minnesota and which occurred in the State of Minnesota. The full story, however, is known only to these petitioners. The respondents-plaintiffs are not required to prove their right to recovery in order to establish jurisdiction over the petitioners at this stage of the case.

It has been held in *United States v. Montreal Trust Company* (C.A. 2nd 1966), 358 F.2d 239, 242, cert. denied 86 S.Ct. 1366, 384 U.S. 919, 16 L.Ed.2d 440, in passing upon a jurisdictional motion under Rule 12:

> "At this early stage of the proceedings, the government [plaintiff] should not have been required to submit proof which would, in effect, establish the validity of its claim and its right to the relief sought. Rather, to bring such §302 into operation, and thereby invoke the jurisdiction of the District Court, the government was required to establish only prima facie tax-related transactions of Klein in New York."

With respect to the procedure adopted by the Minnesota Courts, we should note that the respondents-plaintiffs have suggested both to the trial court and to the Minnesota Supreme Court that, in view of the complexity of the case, the

Court might have invoked *Minnesota Rules of Civil Procedure*, Rule 12.04 (identical to Federal Rule 12(d)), providing that the Court defer the hearing and determination of the jurisdictional questions until the trial on the merits. The petitioners vigorously objected to such a procedure in the trial court.* The Minnesota Supreme Court did not, however, order the determination deferred until trial but instead decided the issue on the basis of the evidence before it, a procedure which the petitioners themselves desired.

Question No. 2
(Petition pp. 3 and 21-24)

In Question No. 2 the petitioners claim that the Minnesota long-arm statutes involved, in particular *Minn. Stat.* §543.19, is more restrictive in its scope than the limits of due process and that the Minnesota Court should not have construed §543.19 as a statutory effort to exert the state's maximum power under the due process clause. This question was not presented in the Minnesota Court.

This argument, moreover, is merely a contention that the Minnesota Court misconstrued a Minnesota statute. Such a contention does not raise a federal question. This Court has held that the highest Court of a state is the final arbiter in the construction of a state statute. *Frost v. Railroad Commission of State of California* (1926), 46 S.Ct. 605, 271 U.S. 583, 70 L.Ed. 1101; *Supreme Lodge, etc. v. Meyer* (1924), 44 S.Ct. 432, 265 U.S. 30, 68 L.Ed. 885. See also 28 *U.S.C.A.* §1257, note 94, and cases cited therein.

The petitioners do not contend that the Minnesota long-arm statutes involved, *as construed*, violate any constitutional provision.

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*Such a procedure is specifically approved in complex cases in Wright and Miller, *Federal Practice and Procedure* §1351, Vol. 5, page 566.

Furthermore, and without extended discussion, it is obvious that the facts relied upon by the Minnesota Court in finding jurisdiction over these petitioners fall well within the statutory language in the Minnesota long-arm statutes involved, *Minn. Stat.* §543.19 and §303.13, Subd. 1(3).

Question No. 3

In Question No. 3, the petitioners apparently contend that the Minnesota Court erroneously decided that jurisdiction over these petitions could be sustained on the basis of a "tortious conspiracy outside the state causing injury within the state."

It is difficult to determine precisely what is meant in this contention.

The contention itself is based upon the erroneous conclusion that the complaint states a cause of action only for conspiracy whereas, as we pointed out previously, the complaint states several causes of action only one of which is conspiracy.

It further appears that the activities of the Pioneers and Burke in connection with the fraudulent scheme had a more than adequate connection with the State of Minnesota. The Minnesota Supreme Court found, 172 N.W.2d at 309, that petitioner Burke (president of the Pioneer corporations) and defendant Sheehan on March 21, 1966 directed a bank in San Antonio to send certain stocks to the First National Bank of St. Paul, and thence to the Nevada State Bank in Las Vegas, said letter being directly involved in the totality of these complex financial transactions. Petitioner Burke also executed a purchase agreement dated March 24, 1966 which is also signed by defendants Sheehan and Yearbury on the same day. On March 24, 1966 defendants Sheehan and Yearbury were physically in St. Paul on the premises of the First National Bank of St. Paul. On its face, this document

indicates that Burke must also have been present in St. Paul, or, at least, he permitted someone to act on his behalf. In any event, the fatal transactions that occurred in St. Paul, Minnesota on March 24, 1966 resulted in enriching petitioner Burke by $24,000.00 in cash plus an interest in a surplus debenture note. It is impossible to separate the petitioners from the transactions in St. Paul on March 24, 1966. These petitioners participated in bringing about those transactions and played a vital role therein.

In addition, and as a part of the underlying strata giving rise to this action, petitioner Pioneer Casualty Co. owned about 13,000 shares of stock in North Central until November, 1965. This stock was apparently overvalued by Pioneer and the Texas Department of Insurance had claimed that Pioneer was impaired by reason thereof. Defendant Sheehan thereupon, in November of 1965, borrowed $250,000 from defendants First National Bank of St. Paul and Murphy (a finance company located in St. Paul, Minnesota) to buy North Central's stock from Pioneer and thus relieve the situation. It was this loan, among others, which Sheehan and the First National Bank of St. Paul and Murphy sought to pay off by the fraudulent transaction occurring later on March 24, 1966. Defendant Murphy, in turn, had a real interest in loaning $200,000 to Sheehan for this purpose because Murphy had premium financing contracts with Pioneer and Murphy was concerned about the continued solvency of Pioneer. Under the premium financing agreements, Murphy, in St. Paul, was Pioneer's attorney-in-fact (see Hunt Affidavit (I) and exhibits thereto). Pioneer's physical connection with Minnesota had become well established, therefore, long prior to March 24, 1966.

It is apparently conceded by petitioners that the damage resulting from those transactions fell primarily within the State of Minnesota. North Central's policyholders were pri-

marily Minnesota residents. This is not a case in which the activities of parties in other states have unkowingly and unwittingly and indirectly caused remote damage in another state. If the petitioners are found to be liable under any claim for relief, such a finding would necessarily imply that the petitioners knew that their acts would cause damage primarily in Minnesota.

At any rate, the question presented involves no federal question of substance and is not contrary to any of this Court's opinions (Petition pp. 3 and 24-25).

Question No. 4
(Petition pp. 3 and 26-27)

We cannot understand the petitioners' presentation in Question No. 4. Apparently petitioners are objecting to discovery proceedings which have already taken place in Las Vegas, Nevada. This question is moot.

If the petitioners are seeking a stay of all proceedings, we comment only that this action was commenced in March of 1968 and the jurisdictional objections asserted by the petitioners and other defendants were not fully resolved until October of 1969, almost 18 months later.

Only in January of 1970 have the respondents-plaintiffs had the opportunity to begin the ordinary process of preparing for trial through discovery techniques. The respondents-plaintiffs are attempting to manage a receivership of an insurance company which was collapsed by the activities of these same petitioners among others. The delays that have already occurred in this lawsuit have been substantial and the Minnesota Court was quite correct in refusing to countenance any more delaying tactics from these petitioners. The receivership of North Central and the claimants against this receivership have a right to a speedy determination of this case. The connection of the petitioners Burke and Pioneers

with the allegedly fraudulent transactions is abundantly clear already. The depositions that were recently concluded in Las Vegas, Nevada have made those connections even more certain. The Minnesota Court has acted properly in speeding the prosecution of this case.

We do not understand that the petitioners are raising a federal question as to the "retroactive" application of the Minnesota long-arm statute §543.19. If that question should somehow be involved, however, we cite this Court's decision in *McGee v. International Life Ins. Co.*, 355 U.S. 220, 2 L.Ed.2d 223, 78 S.Ct. 199, in which this Court specifically held that a retroactive application of a long-arm statute involved no vested rights and was not violative of the due process clause. 355 U.S. at 224.

CONCLUSION AND SUMMARY

The petitioners have not presented, as a question for decision, the bare issue of whether the jurisdictional contacts by the petitioner were adequate to satisfy the requirements of due process. Some comment is in order.

The jurisdictional contact in *McGee v. International Ins. Co.*, supra, consisted merely of mailings in connection with one insurance policy. The insurance company involved had no other contacts whatever. This Court held that the contact was sufficient.

It is obvious, under the facts presented to the Minnesota Supreme Court, and not contested by these petitioners, that the contacts in this case were far more substantial than those in the *McGee* case. No real question could be raised about the constitutional adequacy of those contacts, and we surmise that that is the reason why the petitioners have engaged in such a markedly strained effort to concoct "federal questions" out of routine issues involving standard trial practice and the interpretation of state statutes.

Given the expanding concepts of in personam jurisdiction alluded to in *McGee,* supra, the Minnesota Court was completely correct in its decision.

We pray that the petition be denied.

Respectfully submitted,

DOUGLAS M. HEAD
Attorney General of the
State of Minnesota
ARNE L. SCHOELLER
Chief Deputy Attorney General
of the State of Minnesota
and
CLAY R. MOORE
Special Assistant Attorney General
of the State of Minnesota
1000 First National Bank Bldg.
Minneapolis, Minnesota 55402
Attorneys for Respondents
Hunt and Weese

COUNSEL OF RECORD

KENNETH GREEN, ESQ.
845 Northwestern Bank Building
Minneapolis, Minnesota 55402
Attorney for Petitioners

JAMES B. VESSEY, ESQ.
2300 First National Bank Bldg.
Minneapolis, Minnesota 55402
Attorney for Respondent
Murphy Finance Company

ROBERT LANG, ESQ.
400 First Federal Building
Minneapolis, Minnesota 55402
Attorney for Respondent
Fidelity & Deposit Company of Maryland

APPENDIX

STATE OF MINNESOTA
COUNTY OF RAMSEY

DISTRICT COURT
SECOND JUDICIAL DISTRICT

THOMAS C. HUNT, Conservator and Trustee of North Central Fire & Casualty Co.,

Plaintiff,

vs.

NEVADA STATE BANK, a Nevada corporation, ET AL.,

Defendants.

AMENDMENT TO COMPLAINT

Plaintiff hereby amends his Complaint by adding the following as paragraph "Y" thereof:

Y.

Plaintiff furfher alleges as to defendants Pioneer General Agency, Inc. and Pioneer Casualty Company that said defendants participated in, and in part caused to happen, the transactions occurring on and about March 24, 1966 in the State of Minnesota and the transactions occurring in the State of Nevada, by, among other things, bringing about negotiations between the "Roberts Group" and defendant Cyril Sheehan for the sale by Sheehan of his interests in North Central Fire & Casualty Co. and of his interests in Pioneer General Agency, Inc. and Pioneer Casualty Company; that, upon information and belief, said Pioneer General Agency, Inc. and Pioneer Casualty Co. deposited certain sums of money with the Las Vegas Banks for the purposes of encouraging and facilitating said banks to loan money to the "Roberts Group" for the purchase of North Central Fire & Casualty Co., and Pioneer General Agency, Inc. and Pioneer

Casualty Company; and, that said Pioneer General Agency, Inc. and Pioneer Casualty Company, through their president, Harold Burke, conspired with the "Roberts Group," defendant Sheehan and others for the purpose of bringing about a fraudulent transfer, conversion and misappropriation of North Central Fire & Casualty Co. assets.

29 May 1968.

DOUGLAS M. HEAD
Attorney General of the
State of Minnesota
By /s/ CLAY R. MOORE
Special Assistant Attorney General
of the State of Minnesota
1000 First National Bank Building
Minneapolis, Minnesota 55402
333-1341
Attorney for Thomas C. Hunt
Insurance Commissioner for
the State of Minnesota

AFFIDAVIT OF SERVICE BY MAIL

STATE OF MINNESOTA)
) ss.
COUNTY OF HENNEPIN)

Lynn A. Beneke of the City of Minneapolis, County of Hennepin, in the State of Minnesota, being duly sworn, says that on the 31st day of May, 1968, she served the annexed Amendment to Complaint on Mr. Kenneth Green, the attorney for Pioneer Casualty Co., Pioneer General Agency, Inc. and Harold L. Burke, the defendants in this action, by mailing to him a copy thereof, inclosed in an envelope, postage prepaid, and by depositing same in the post office at Minneapolis, Minnesota directed to said attorney at Northwestern Bank Bldg.,

Minneapolis, Minn., the last known address of said attorney.

/s/ LYNN A. BENEKE

Subscribed and sworn to before me
this 31st day of May, 1968.

ORPHA O. WILLETT
Notary Public,
Hennepin County, Minn.
My Commission Expires Sept. 10, 1973.